

Little Sisters Book and Art Emporium v. Minister of Justice: Sex Equality and the Attack on R. v. Butler

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LITTLE SISTERS BOOK AND ART EMPORIUM v. MINISTER OF JUSTICE: SEX EQUALITY AND THE ATTACK ON *R. v. BUTLER*[©]

BY JANINE BENEDET*

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Scholars and philosophers spend much of their time discussing what pornography means and whether it can be defined.¹ This debate persists despite the fact that most men, regardless of their sexual orientation, seem to understand quite well what pornography is, and what it is for: they produce it commercially, buy it in magazines, rent it in videos, and search for it on the Internet. Then they masturbate to it. Producers and consumers of pornography seem to be able to grasp what it is, as a product, without much more confusion than is produced by shopping for a mattress. One

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¹ See, for example, in Canada, B. Arcand, *The Jaguar and the Antelope: Pornography and the Modern World*, Wayne Grady, trans. (Toronto: McClelland & Stewart, 1993); and L. Green, "Pornographies" (2000) 8 J. Pol. Phil. 27.

goes to the store that advertises this product, describes the specific features one is looking for, and makes a purchase if the price is right.

Nonetheless, it can be useful for those in a particular business to point out the blurred boundaries of definitions: is an air mattress a mattress? What about a futon? This technique proves most useful when legislators are seeking to regulate or restrict certain products. And so the debate begins: What is pornography anyway? And if we can't agree on that definition, how can we regulate it under the legal label of "obscenity"? Of course, the pornography industry is not exactly like the mattress industry, at least as far as legal challenges to its regulation. The pornography industry has the distinct advantage of selling a product that, in legal terms, is considered "expression," and therefore a product that has been declared worthy of constitutional protection under section 2(b) of the *Canadian Charter of Rights and Freedoms*.²

The decision of the Supreme Court of Canada in *Little Sisters Book and Art Emporium v. Minister of Justice*³ challenges the interest of those who want the traffic in pornography to be completely unregulated. Trying to use the courts to achieve this result is not new. The Court rejected this outcome in *R. v. Butler* almost ten years ago.⁴ What is notable about *Little Sisters* is that this interest was packaged for the Court not only in the traditional civil libertarian guise of expression, but also under the banner of equality for gays and lesbians. Fortunately, the Court in *Little Sisters* recognized pornography for what it is—the practice of sex inequality—and held that gays and lesbians were no less entitled to legal protections that attempt to limit the inequality that pornography inflicts.

Some observers of this decision have expressed surprise that the majority of the Court, despite its sharp criticism of many of Canada Customs' actions, refused to strike down the legislation, which sets out a procedure for the detention and prohibition of "obscenity" at the border.⁵

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

³ [2000] 2 S.C.R. 1120 [hereinafter *Little Sisters*].

⁴ [1992] 1 S.C.R. 452 [hereinafter *Butler*]. In this decision, the Court defined "obscene" in s. 163(8) of the *Criminal Code*, R.S.C. 1985, c. C-46 [hereinafter *Code*] as sexually explicit materials combined with violence, the use of children, or where the sexual activity is degrading and dehumanizing and poses an undue risk of harm to sex equality rights. In this comment, I use the term "pornography" to mean the subset of sexually explicit material that I consider meets this definition.

⁵ See, in this volume, B. Ryder, "The *Little Sisters* Case, Administrative Censorship and Obscenity Law" (2001) 39 Osgoode Hall L.J. 207. The Court did strike down a reverse onus provision in the legislation that placed the onus on the importer to show that a detained publication was not obscene.

I do not share their surprise. I think the explanation for this result can be found in the reasons why the Court unanimously recognized that same-sex pornography threatens, rather than promotes, equality rights. The Court's decision can usefully be analyzed in the context of the arguments framed by the claimants, the bookstore, and interveners who supported their case, arguments which failed both to convince the Court that pornography plays a special, positive role for gay men and lesbians, and that pornography more generally is not harmful. This latter argument reveals the underlying goal of the *Little Sisters* litigation: to attack the *Butler* decision by claiming that feminist arguments about pornography were wrong, and inevitably provoke restrictions on the "expression" of "minority sexual practices."⁵

This comment begins by setting out some of the facts in *Little Sisters*, and ends by arguing that gay and lesbian pornography is a threat to sex equality. It does this by examining some of the exhibits at issue in the appeal, on the basis that an appreciation of the range of materials that were potentially affected by the bookstore's claim is important in order to evaluate the claim fairly. It then outlines and critically evaluates the arguments that were advanced by the bookstore, and the intervener groups in support of it. Finally, it situates the Court's decision in this context of fact and argument. Mainly, it supports the Court's decision in *Little Sisters*, which confirmed most of the findings of the trial judge, but did not strike down the legislation.

I. THE EXHIBITS

Little Sisters was routinely portrayed in the media as a case about Canada Customs censoring gay and lesbian literature.⁷ Little Sisters, it was stressed, was a bookstore and de facto community centre, not some seedy porn shop.⁸ While it is true that Little Sisters imports and sells books of various kinds, it also sells pornography. Among the material that Little Sisters ordered from other countries, and objected to Canada Customs' delay or prohibition of, were: a magazine in which women are

⁶ *Ibid.*

⁷ See, for example, "The Agents who Seize Books at the Border" *The Globe and Mail* (19 December 2000) A16; and L. Chwialkowska, "Supreme Court Ruling Viewed as 'Partial Victory'" *The National Post* (16 December 2000) A6.

⁸ Justice Binnie, for the majority, makes this point in the opening paragraph of the majority reasons at 1135. I also found that many people assumed that Little Sisters was a lesbian or women's bookstore, presumably because of its name. In fact, the store is owned by two gay men who named it after their cat.

photographed hung from chains around their necks or wrists, their nipples compressed in clamps, being whipped by other women, who refer to them by sexually degrading names; a magazine with a photo of a naked woman with a gun who is presented as liking to insert the gun into her vagina; sexually explicit materials that sexualize racist stereotypes and degrade members of racial minorities, including Asian men and African-American men, for the purpose of sexual arousal; and materials that sexualize incest and sex with children, reinforcing the stereotype that gay men recruit by preying sexually on boys.⁹

There were also numerous materials for gay men glorifying masculinity and men who meet a hyper-masculine ideal. In this material, men who are more feminine are called "faggots" and subjected to degrading and dehumanizing sexual epithets usually used against women, such as "cunt" or "bitch." Often, the hyper-masculine men who inflict this degradation, and who use the more feminine men sexually, are presented as straight or heterosexual in the material.¹⁰

At trial, the Crown also introduced evidence of other examples of pornography ostensibly marketed at a gay or lesbian audience that were ordered by other retailers, and prohibited entry into Canada by Customs. These exhibits were important because they presented to the court other more violent or degrading sexually explicit material that would also be able to be imported freely into Canada if the bookstore's arguments were accepted. They included: a magazine that presented men torturing other men in sexually explicit ways with hot wax, heat, and fire; a magazine that presented photos of persons who have been defecated on and who are eating the feces; and a film that presented scenes of men sexually using other men who are being hit, whipped and bit, penetrated by large objects, and pulled by neck chains.¹¹ There was also a magazine in which sexually explicit torture is presented in a military setting, including a photo in which the person inflicting the abuse is wearing a Nazi uniform.¹² All of these materials meet the harm-based definition of obscenity developed in *Butler*.

⁹ "The Weekend" *Bad Attitude* 8:1, Exhibit 134; "Tracey and Her Gun" *On Our Backs* (July/August 1992), Exhibit 133; *Oriental Guys* 6 (Spring 1990); *Marty*, Exhibit 33; "An Enema from his Father" *Orgasms*, Exhibit 206; and "Sucks Brother Off Before Wedding" *Juice*, Exhibit 213. All of these titles were prohibited entry into Canada except *Marty*, which was detained but later released.

¹⁰ See, for example, the exhibits "Sucked Off Nine Times in One Day" *Juice*; and "I was a Substitute Vagina" *Humongous*, Exhibit 212.

¹¹ *Dungeon Master*, *The Male S/M Publication* 39, Exhibit 48; *Mr. S/M* 65, Exhibit 115E; *Headlights and Hard Bodies*, Exhibit 192.

¹² *Mach* 19 at 46, Exhibit 49.

Common to all of these materials, apart from the fact that the participants in each of them are of the same biological sex, is the element that those who are being sexually abused, violated, degraded, and hurt are presented as enjoying sexually the abuse, violation, degradation, and pain. The violence or degradation is presented as sexually enjoyable for both the abuser and the abused. This pornographic template is shared with opposite sex pornography, and is part of the inequality that pornography both presents and promotes.¹³

There was also ample evidence introduced by the bookstore that Customs sometimes delayed or prohibited materials ordered by Little Sisters that other mainstream book retailers were able to order without incident, and that Customs denied entry to some materials solely on the ground they presented same-sex sexual acts, most often anal intercourse, while allowing importation of opposite sex materials which combined explicit sex and violence against women. Taken together, the evidence pointed to a clear pattern of discriminatory treatment against Little Sisters by Customs. The trial judge found these acts to be discrimination and this finding was not appealed or cross-appealed by the federal government before the British Columbia Court of Appeal or the Supreme Court of Canada.¹⁴

The bookstore tried to link this discrimination to the *Butler* decision, despite the fact that its claim focused on Customs' actions in the ten-year period between December 1983 and August 1994, and *Butler* was not decided until February 1992. In fact, there was evidence that Customs had been advised after *Butler* that it should remove "anal intercourse" from its internal definition of obscenity in light of *Butler*'s focus on harm, rather than morality.¹⁵ Customs' failure to implement this recommendation until shortly before the trial clearly prolonged the unconstitutional treatment, but it cannot be attributed to *Butler*.

¹³ For a discussion of the importance of the appearance of consent in pornography see, A. Dworkin, *Letters from a War Zone* (Brooklyn: Lawrence Hill Books, 1993) at 9-12. See also C. MacKinnon, *Toward A Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) at 210-11.

¹⁴ This makes the bookstore's repeated claims that the government had forced it to endure a fifteen-year ordeal in the courts somewhat disingenuous. It was the bookstore, unsatisfied with the remedy at trial, which pursued both of the appeals. While the bookstore had every right to do so, it seems pointless to blame this on the government, just as it would be unfair for the government to blame the bookstore for subjecting it to what turned out to be two unmeritorious appeals.

¹⁵ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* (1996), 131 D.L.R. (4th) 486 (B.C.S.C.) at 577 [hereinafter *Trial Decision*].

It is important to consider the pornography described above as part of any assessment of the Court's decision because this was not merely a case about problems with importing Marguerite Duras and Jean Genet.¹⁶ The primary remedy sought by Little Sisters, that Customs be constitutionally prohibited from denying entry into Canada of any "expressive" materials, would apply to all same-sex pornography, including the exhibits I have described, not to mention opposite sex and child pornography, just as it would to literary works. Little Sisters did not argue that Customs should be ordered to confine itself to prohibiting only those materials that meet the definition of obscenity as set out in *Butler*. It argued that Canada Customs "should not be in the business of banning books" at all.¹⁷ Treating all "imported sexual representations" as a monolithic category for the purposes of the *Charter's* section 1 analysis does not address the full implications of the bookstore's argument.¹⁸

II. THE LEGISLATIVE SCHEME

Before turning to the arguments advanced before the Court, it is worth summarizing briefly the legislative scheme that gives Customs the authority to prohibit materials imported into Canada. The sections of the *Customs Act*¹⁹ that apply to the importation of books, magazines, and videos are the same as those that apply to the importation of all other goods. Everyone wishing to bring goods into Canada—whether in person or by mail—must report them to Customs. Customs officers have the authority to value the goods and to determine their appropriate tariff classification and may detain the goods at the border in order to make these determinations.²⁰ If the classification is one that is admissible, the duty owing is calculated. If the classification is prohibited, such as obscenity, hate propaganda, or British beef, the goods are denied entry into Canada and the importer is to be notified without delay, with reasons for the determination.²¹

¹⁶ Books by these authors, namely *The Man sitting in the Corridor*, by Duras, and *Querelle*, by Genet, were delayed entry into Canada by Customs when ordered by Little Sisters.

¹⁷ Counsel for Little Sisters used this phrase in oral argument before the Court.

¹⁸ See *supra* note 5.

¹⁹ R.S.C. 1985, (2nd Supp.), c. 1.

²⁰ *Ibid.*, ss. 57(1), 58.

²¹ *Ibid.*, s. 59(2).

Importers who are dissatisfied with a decision may apply to Customs for a redetermination of the classification or valuation by a specially designated officer, and a further review by the deputy minister.²² Importers of materials prohibited under the tariff classification that includes obscenity²³ can appeal the decision of the deputy minister to the appropriate provincial superior court, and then to the federal court of appeal on a question of law. The goods are detained until this process is completed and, if they remain prohibited at the end of the process, they can be exported somewhere else, or abandoned to the Crown and destroyed.

The *Customs Tariff* defines obscenity by reference to section 163(8) of the *Code*, the section interpreted and ultimately upheld in *Butler*. Customs issues guidelines in the form of memoranda and a manual of examples to assist officers in applying the judicial interpretation of this *Code* section to the materials they review. The trial judge found that Customs had incorrectly included anal intercourse as per se obscene in its memorandum, and had been slow to remove it. This led to a considerable amount of gay male materials being prohibited when they were not in fact obscene. By the time of trial, however, Customs had amended its memorandum on obscenity and the trial judge found that it was a generally accurate and complete summary of the law.²⁴

III. THE JUDGMENTS BELOW

Justice Smith reviewed the legislative scheme and found that, on its face, it was a fair and reasonable system that provided a complete statutory code of review and appeals with reasonable time limits. He also found that the legislation was drafted to prohibit only obscene materials.²⁵ By linking the *Customs Tariff* to the *Code* definition, only material that is illegal to distribute in Canada was denied entry. He rejected the argument that same-sex pornography could never be "obscene" and indeed the bookstore

²² *Ibid.*, ss. 60, 63. The interim review by the designated officer was eliminated in the 1993 amendments.

²³ Now Tariff Item 9899.00.00, pursuant to s. 136(1) of the *Customs Tariff*. This Tariff Item includes materials that are obscene pursuant to s. 163(8) of the *Code*; child pornography under s. 163(1) of the *Code*; hate propaganda; and seditious and treasonable materials. This system of tariff items was introduced in 1998 and replaced the former system of tariff codes. For the purposes of the case, however, nothing turns on these amendments and so the terms presently used by Customs will be used in this comment.

²⁴ *Trial Decision*, *supra* note 15 at 509.

²⁵ *Ibid.* at 552.

conceded at trial that some sexually explicit same-sex materials could meet the *Butler* definition. He also rejected the argument that there was no reasoned basis for Parliament to view this material as harmful, and found that its special value to the gay and lesbian community could not be relied on to exempt it from the reach of the legislation.²⁶

Justice Smith did agree with the bookstore, however, that the evidence showed a pervasive and persistent pattern of misapplication and misadministration of the Customs legislation with respect to Little Sisters that violated the bookstore's sections 2(b) and 15 *Charter* rights. However, he concluded that these errors could be corrected with proper staffing, training, and guidance from the courts, and that they did not require that the legislation be struck down. He therefore issued a declaratory remedy pursuant to section 24(1) of the *Charter*.²⁷

The majority of the B.C. Court of Appeal agreed with the declaratory remedy issued by the trial judge.²⁸ Justice Finch, dissenting, held that the legislation did not provide an intelligible standard for Customs officers, and therefore any section 2(b) infringement was not prescribed by law under section 1 of the *Charter*. However, he was not prepared to strike down the legislation in its entirety, and would have confined his remedy to "homosexual books, printed paper, drawings, paintings, prints, photographs or representations of any kind that are alleged to be obscene."²⁹

The bookstore unsuccessfully sought an injunction against Canada Customs after the trial, arguing that Customs was not acting in accordance with the declaration.³⁰ On this application, Justice Smith found that Customs had acted quickly to implement a number of administrative reforms in accordance with his reasons. These reforms were designed to ensure that only obscene material was prohibited and to make it easier for importers to find out the reasons for a prohibition and to challenge that classification. He denied the bookstore's request to enjoin Customs from applying the tariff to its shipments.

²⁶ *Ibid.* at 540.

²⁷ *Ibid.* at 554-55.

²⁸ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* (1998), 160 D.L.R.(4th) 385 (B.C.C.A.) [hereinafter *Court of Appeal Decision*].

²⁹ *Ibid.* at 446.

³⁰ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 670 (S.C.), online: QL (BCJ).

IV. THE ARGUMENT

The bookstore argued before the Court that there was a lack of concordance between the scope of the trial judge's findings and the remedy granted. The trial judge found that the bookstore was treated unfairly, and that Customs had not applied *Butler* properly. But the trial judge declined to find that Customs could not apply the legislation within the limits of *Butler*, or that it should not be doing so in light of sections 2(b) or 15 of the *Charter*.

On appeal, the bookstore offered three alternative arguments in support of striking down all or part of the legislation. First, it argued that the legislation should be struck down because allowing Customs to stop any expressive material at the border violated section 2(b) of the *Charter*. This argument presented a direct attack on the decision in *Butler*.³¹ In particular, Little Sisters' position was that pornography was not harmful but beneficial, and that the weight of opinion on this issue had shifted since *Butler* was decided.

Second, the bookstore argued that even if heterosexual pornography was harmful to the equality rights of women, the same could not be said about gay and lesbian pornography, since it was vital to the gay and lesbian community's sense of identity. Moreover, the fact that all the participants were of the same sex removed the power imbalance that produced inequality in opposite sex pornography, a fact that *Butler* had overlooked, to the detriment of gays and lesbians. Thus, application of the tariff to this category of materials violated both sections 2(b) and 15 of the *Charter* and the appropriate remedy would be a constitutional exemption from the Customs tariff that would prohibit Canada Customs from applying the legislation to gay and lesbian pornography, while permitting its continued application to heterosexual materials.

The bookstore's third argument combined parts of the first two. It argued that the legislation violated section 2(b) of the *Charter* to the extent that it was applied to written materials such as books, and presumably any other drawings or printed material that did not use real people in its

³¹ Counsel for the bookstore backed away from this direct attack during the hearing of appeal. Instead counsel argued that the decision in *Butler* could be upheld, but that the criminal courts, with all of their procedural protections, were the proper place for determinations of obscenity. This argument fails to recognize that those procedural protections are accompanied by a significantly greater degree of jeopardy for the accused than the forfeiture of the item in question, a point Justice Binnie notes in his majority reasons.

production. Once again, the accompanying remedy would be an exemption of such materials from the legislation.

The bookstore's arguments, then, and the associated remedies sought, focused as much on the nature of the materials at issue as the misadministration of the Customs scheme and the procedures used for reviewing materials. This decision to advance so many arguments simultaneously was ultimately confusing and unconvincing for the majority of the Court. In particular, neither the majority nor the dissent accepted, to any significant degree, any of the arguments based on the nature of the materials themselves.

V. THE DECISION OF THE SUPREME COURT OF CANADA

After reviewing the history of Customs prohibitions affecting Little Sisters and the scope of Customs' duties, Justice Binnie noted that "[t]he *Criminal Code* does not characterize 'obscenity' based on sexual orientation and neither, it must be inferred, did Parliament intend Customs officials to do so."³² Of course, this comment cuts both ways. It condemns the differential treatment meted out to the bookstore, but suggests that a constitutional exemption for gay and lesbian materials is also unwarranted.

Justice Binnie found, and in fact the government conceded, that the Customs legislation, when applied to prohibit entry of expression into Canada, violates section 2(b) of the *Charter*. But he rejected the argument that section 163(8) of the *Code* as interpreted in *Butler* was inapplicable to same-sex materials or that section 15 of the *Charter* was violated in its application to such materials, noting that *Butler* was directed to the prevention of harm, regardless of the context in which it arises. He considered the appellant's argument that the *Butler* community standards test would inevitably result in the application of majoritarian heterosexual norms to gay and lesbian material, noting:³³

[t]his line of criticism underestimates *Butler*. While it is of course true that under s. 163 of the *Criminal Code* the "community standard" is identified by a jury or a judge sitting alone, and to that extent involves an attribution rather than an opinion poll, the test was adopted to underscore the unacceptability of the trier of fact indulging in personal biases ... A concern

³² *Supra* note 3 at 1142.

³³ The bookstore's argument also ignores the fact that violent gay male pornography was part of the record in *Butler*, albeit a small part, and this material was discussed in LEAF's factum as a threat to sex-equality rights: K. Busby, "LEAF and Pornography: Litigating on Equality and Sexual Representations" (1994) 9 Can. J.L. & Soc. 165 at 179-80.

for minority expression is one of the principal factors that led to the adoption of the national community test in *Butler* in the first place ...³⁴

Justice Binnie also rejected the bookstore's argument that the harm-based test is a morality standard in disguise. In particular, he rejected the argument that sado-masochistic pornography should be understood as harmless where the persons presented are of the same biological sex:

The potential of harm and a same-sex depiction are not necessarily mutually exclusive. Portrayal of a dominatrix engaged in the non-violent degradation of an ostensibly willing sex slave is no less dehumanizing if the victim happens to be of the same sex, and no less (and no more) harmful in its reassurance to the viewer that the victim finds such conduct both normal and pleasurable.³⁵

Justice Binnie also highlighted the opposing positions regarding same-sex sado-masochistic pornography advanced by the two interveners representing women's groups, LEAF, and Equality Now. He noted LEAF's position that sado-masochism performs an emancipatory role in gay and lesbian culture, and that gender discrimination is not an issue in "same-sex erotica."³⁶ By contrast, Equality Now argued that gay men and lesbians have a right to equal protection from the harm of violent pornography, including "sado-masochistic" pornography. Justice Binnie rejected LEAF's position:

LEAF's argument seems to presuppose that the *Butler* test is exclusively gender-based. Violence against women was only one of several concerns, albeit an important one, that led to the formulation of the *Butler*-harm based test, which itself is gender-neutral. While it would be quite open to the appellants to argue that a particular publication does not exceed the general community's tolerance of harm for various reasons, gay and lesbian culture as such does not constitute a general exemption from the *Butler* test.³⁷

He also rejected the bookstore's most persuasive argument, that the defects in the administration of the legislation were so closely tied to the legislation itself that it should be struck down. In particular, he did not accept the comparison of *R. v. Morgentaler*,³⁸ where the legislation itself

³⁴ *Supra* note 3 at 1160.

³⁵ *Ibid.* at 1163.

³⁶ Justice Binnie's characterization of LEAF's argument is not strictly accurate. A reading of LEAF's factum demonstrates that it confined its arguments to lesbian materials and did not directly express any opinion on gay male materials.

³⁷ *Supra* note 3 at 1164.

³⁸ [1988] 1 S.C.R. 30.

contained specific procedures that infringed *Charter* rights, to the instant case, where the legislation was broadly drafted and capable of constitutional application. However, he did agree that the reverse onus provision was unconstitutional, and that the party who is alleging that material is obscene should have to prove it on a balance of probabilities.

In general, the majority's decision in *Little Sisters* is consistent with the harm-based approach set out in *Butler*. However, there are some problems with the decision, specifically with how Justice Binnie treats the relationship between pornography and attitudinal harm and his understanding of the relationship between pornography and sex inequality. He noted "that there was no evidence that [Customs officers] suffered harmful attitudinal changes as a result of their prolonged exposure to the sexually explicit material sought to be imported by the appellants, albeit their exposure was job-related."³⁹ This conclusion appears to be based on the bookstore's claim that a study of Customs officers did not discover any negative effects from their exposure to pornography.⁴⁰

Even if one is prepared to equate the experience of controlled viewing at work with that of masturbating to pornography at home, the broad claim that pornography is not harmful does not find support in this study. In fact, the study was conducted after a number of Customs officers complained about the effects that viewing pornography, especially pornography involving children, violence, and animals, was having on them. They reported being bothered by what they had seen after they left work and were having difficulty sleeping. A clinical psychologist who reviewed the complaints of these officers concluded that they were normal in their attitudes toward sex and in their emotional development.⁴¹ One might as easily conclude from this study that normal people are bothered and upset by pornography.

It is also disappointing that the majority of the Court did not take the opportunity to clarify what was meant by the statement in *Butler* that explicit presentations of degrading or dehumanizing sexual acts will be undue, and thus obscene, "if the risk of harm they present is substantial."⁴² The Court in *Butler* stated that the "inference [of a risk of harm] may be drawn from the material itself or from the material and other evidence,"

³⁹ *Supra* note 3 at 1138.

⁴⁰ *Ibid.*, (Appellant's Factum at para. 58).

⁴¹ *Ibid.*, (Appellant's Supplementary Record at 1921-30).

⁴² *Supra* note 4 at 485.

making clear that independent evidence of harm is not invariably required, but failing to specify with any precision when it might be.⁴³ Similarly, the Court was unclear as to how the requirement should be satisfied, given that the best it could offer in the *Charter's* section 1 analysis was that the government had a "reasoned apprehension of harm" with respect to the need for the legislation itself. It is hard to imagine that the Court envisioned that most degrading and dehumanizing sexually explicit materials would *not* be considered obscene, or would only be considered obscene if they presented illegal acts, as Professor Ryder suggests,⁴⁴ since the Court also says that:

Among other things, degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission, or humiliation. They run against the principles of equality and dignity of all human beings. In the appreciation of whether material is degrading or dehumanizing, the appearance of consent is not necessarily determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.⁴⁵

This direction appears to have been overlooked by the trial judge in the subsequent case of *R. v. Hawkins*, who cited the enthusiastic participation of the women in the pornographic film he viewed as support for the conclusion that it did not meet the *Butler* standard, ignoring the context in which this enthusiasm was presented.⁴⁶ This case, and its companion cases, which were the subject of a joint appeal, remain the only post-*Butler* authority on adult obscenity in Ontario, based on charges that were laid by police before *Butler* was even decided.⁴⁷ These failures to successfully prosecute adult obscenity cases, along with an increased focus on prosecutions for child pornography offences, among other trends, has resulted in the prosecution of almost no adult obscenity charges in most

⁴³ *Ibid.*

⁴⁴ *Supra* note 5 at 219–20.

⁴⁵ *Supra* note 4 at 479.

⁴⁶ *R. v. Hawkins*, [1992] O.J. No. 1161. (Gen. Div.), online: QL (OJ) [hereinafter *Hawkins*]. In one scene, a woman "orders" a man to have sex with her as punishment for breaking in to her apartment to rape her; in another, a woman "orders" her boss to have sex as punishment for sexually harassing her. The implication of course, is that women do not mind being raped and sexually harassed, that this is just another way of giving them what they want, heterosexual penetration.

⁴⁷ *R. v. Hawkins*; *R. v. Ronish*; *R. v. Jorgensen*; *R. v. Smeenk* (1993), 15 O.R.(3d) 549 (C.A.). Smeenk was convicted. A further appeal by Jorgensen to the Supreme Court of Canada on another ground was allowed [1995] 4 S.C.R. 55.

provinces in the past few years.⁴⁸ Unfortunately, this issue was not directly before the Court in *Little Sisters*.

Another point of concern in the *Little Sisters* decision is Justice Binnie's explanation of why LEAF's attempt to exempt same-sex sado-masochism from the application of *Butler* should be rejected. Justice Binnie claimed that violence against women was only one of several harms identified in *Butler*, and that the test applied in *Butler* is gender-neutral. As discussed below, the value of *Butler* is its recognition that pornography is anything but gender-neutral, and that its harm is sex inequality. Both of these conclusions can be applied to same-sex pornography, and it is not necessary to "neutralize" *Butler* in order to do so.

VI. SEX EQUALITY AND THE *LITTLE SISTERS* DECISION

To say that something is "obscene" within the meaning of section 163(8) of the *Code* as interpreted in *Butler* is to say that it does sex-based harm. If we understand pornography as a social practice that uses sexually explicit pictures or words to subordinate human beings on the basis of gender, it is clear that same-sex pornography meets this definition. Same-sex pornography is gendered, in both obvious and subtler ways. Gay male pornography takes traditional gender norms and behaviour and applies them to a setting in which all the participants are biologically male. Bigger, stronger, more muscular men, often presented as straight, penetrate or are otherwise sexually serviced by weaker, more feminine men. The feminine man is subjected to verbal, physical, and sexual abuse, and is presented as enjoying this abuse.⁴⁹ This pattern closely mirrors the positive-outcome rape pattern of much heterosexual pornography. Simply switching the biological sex of one of the participants does not erase the abuse or the sexualization of the exercise of power.

It might be possible to draw a distinction between this material and opposite sex pornography if the social context in which it operates were significantly different. *Little Sisters* tried to argue that this was the case, claiming that the sexual minority status of gay men and lesbians increased the value of sexual material to them, acting as a method of validating their sexuality and informing them about it. This is no doubt true, although one

⁴⁸ By way of example, a Quicklaw search of Ontario decisions in the period of January 1995–August 2001 does not disclose a single case in which criminal obscenity charges related to adult pornography.

⁴⁹ C.N. Kendall, "'Real Dominant, Real Fun': Gay Male Pornography and the Pursuit of Masculinity" (1993) 57 Sask. L. Rev. 21 at 29–32 [hereinafter *Real Dominant*].

might say the same for heterosexual women whose sexuality is so pervasively appropriated and defined commercially by men. The bookstore's argument concedes that sexually explicit material does affect the sexual attitudes and responses of those who use it. It would be foolish to then believe that there is no harm in validating as normal and sexy abusive behaviour between persons of the same biological sex. In this respect, the social reality of gay men and, to a lesser degree, lesbians, is similar to that of heterosexual women. There is considerable evidence that physical and sexual violence occurs between men with some frequency. The same is true for physical violence in lesbian relationships, although the problem of sexual violence in these relationships appears much lower.⁵⁰

In some of the materials, this abuse is compounded by other kinds of hierarchies. There is the racist pornography that presents white men sexually abusing black or Asian men, who enjoy the abuse, or presents black men as violent sexual predators. It also includes the materials in which gay men purport to describe their initiation into the "gay lifestyle" through sex as children with older men, sometimes their family members. These materials perpetuate the myths that most pedophiles or child molesters are gay, and that men become gay by being recruited by other homosexuals as adolescents.

All of this material normalizes sexual aggression, and male sexual aggression specifically. It eroticizes dominance for both the abuser and the abused. Where gay men identify with the abuser, it contributes to the normalization of rape. Where they identify with the abused, it promotes self-hate. Either way, to be a "faggot" or a "substitute vagina" is to deserve abuse, just like a woman. This encourages gay men to reject any identification with women rather than to condemn the abuse that is visited on women and on them when they challenge compulsory heterosexuality.⁵¹ Those who have a stake in maintaining the sexual status quo of inequality know that the most effective way to achieve this is to make those who are being dominated believe that what they are experiencing is really freedom.⁵²

⁵⁰ A number of authorities on violence in gay male relationships can be found in the *amicus* brief of the National Organization on Male Sexual Victimization (and others) in *Oncale v. Sundowner Offshore Services* (1997) 8 U.C.L.A. Women's L.J. 9. For a study of lesbian battering, see C.M. Renzetti, *Violent Betrayal: Partner Abuse in Lesbian Relationships* (Newbury Park, CA: Sage Publications, 1992) at 23. In her study of women who disclosed abuse from a female partner, 19 per cent said the partner forced them to listen to violent or hostile stories or fantasies as a sexual stimulant as part of the abuse.

⁵¹ *Real Dominant*, *supra* note 49 at 53.

⁵² For an analysis of the misuse of the term sexual freedom, see J. Stoltenberg, *Refusing to be A Man: Essays on Sex and Justice* (Portland, Oregon: Breitenbush Books, 1989) at 123-33.

Some of these arguments about gay male pornography can be applied with equal force to lesbian pornography. Sexual scenes between women are a staple of heterosexual pornography aimed at straight men. The bookstore tried to show at trial that these were quite different from the lesbian materials at issue in this case. Unfortunately, this is not always the case. Much lesbian pornography is merely imitative of materials aimed at heterosexual men. Lesbian-feminist activists Carole Reeves and Rachel Wingfield suggest that the makers of lesbian pornography, "... found very quickly that pornography without inequality was impossible to make, and just wouldn't have 'worked.'"⁵³

It is hard to understand how appropriating this pornographic formula is emblematic of an "authentic" lesbian voice. It is also disingenuous to claim that it is an attempt to reappropriate lesbian sexuality since all it does is imitate a "lesbian" sexuality defined by men, for men.⁵⁴

One hard question that is important to ask in the aftermath of *Little Sisters* is whether pornography, and the right to use it, is really an issue where gay men and lesbian women have identical interests and goals. It may make sense to refer to gays and lesbians simultaneously in campaigning for pension benefits or the right to marry. But the fact is that all men, including gay men, benefit to some degree from sex inequality and masculine sexuality and that all women, including lesbian women, are harmed by it. This is not to say that gay men are not harmed by pornography. Pornography promotes both misogyny and homophobia in its perpetuation of male dominance. But this makes pornography an issue that should encourage gay men to stand with all women against pornography rather than forcing lesbians to choose where their allegiance lies.⁵⁵

The attempt to distinguish written materials, such as books, from the assessment of harm is more interesting. This distinction is at least ostensibly based on a fact relevant to those harmed by pornography in that

⁵³ C. Reeves & R. Wingfield, "Serious Porn, Serious Protest" in L. Harne & E. Miller, eds., *All the Rage: Reasserting Radical Lesbian Feminism* (London: Women's Press, 1996) 60 at 67. The authors point to almost identical passages from *Penthouse* magazine and a collection of short stories for lesbians entitled *Serious Pleasure*. They also note that the first two issues of *Quim*, a lesbian pornographic magazine at issue in *Little Sisters*, contained a description of a nun sexually abusing little boys and a story about a lesbian who breaks into women's houses at night and rapes them, which the women are presented as enjoying.

⁵⁴ S. Jeffrey, *The Lesbian Heresy: A Feminist Perspective on the Lesbian Sexual Revolution* (Melbourne: Spinifex, 1993) at 17-46.

⁵⁵ C.N. Kendall, "Gay Male Pornography after *Little Sisters Book and Art Emporium*: A Call for Gay Male Cooperation in the Struggle for Sex Equality" (1997) 12 Wis. Women's L.J. 21 at 24.

it appears that no real people are abused in order to make written materials. In fact, this is true only some of the time, as the identities of real people are used in written pornography to make it more “real” to those who consume it.⁵⁶ Moreover, it does not appear that social science evidence concerning the harm of pornography can be relied on to neatly separate written pornography in terms of its lack of effect on the consumer. Some of the earliest and most important studies of the effects of pornography on male tolerance for sexual violence used auditory or written descriptions of rape scenarios, not only photographs or videos.⁵⁷

None of this analysis is new, and the discussion of whether same-sex material is harmful, or can or should be subjected to the same analysis or legal treatment as opposite sex material, has existed almost as long as disputes about the harm of pornography itself.⁵⁸ In a 1980 interview, lesbian writer Audre Lorde asked the obvious question that the defenders of pornography prefer not to answer: Who profits from lesbians beating each other?⁵⁹ It would be clearly incorrect to say that the bookstore or its supporters discovered a flaw in feminist arguments about pornography that were never considered when these arguments were first developed.

A commitment to sex equality requires that value judgments be made about sexual acts and practices, judged against equality as a value. This is condemned as moralizing by civil libertarians who adhere to a model of sexual “freedom” and “choice” that is presented as non-judgmental and value-neutral. But the decision by civil libertarians to accept slavery, racism, or violence as acceptable so long as it is sexualized and there is an appearance of consent is a value judgment as well. It values inequality where that inequality can be said to produce for someone, pleasure or profit, or both.

All of this is vitally important to the outcome of the constitutional challenge to the administration of the Customs legislation, because the analysis and understanding of the harm of pornography is crucial to the

⁵⁶ See, for example, *R. v. R.W.*, [2001] O.J. No. 2810 (S.C.), online: QL (OJ).

⁵⁷ See, for example, D. Russell, “Pornography and Rape: A Causal Model” in D. Cornell, ed., *Feminism & Pornography*, (New York: Oxford Press, 2000) at 48–93.

⁵⁸ Andrea Dworkin discusses in some detail the harm of same-sex pornography, and its relationship to the system of male supremacy promoted by heterosexual pornography in her book: *Pornography: Men Possessing Women* (London, The Women’s Press, 1981) at 36–47, published twenty years ago. She also considers whether written pornography is different in her more recent work *Letters From a War Zone* (New York: Lawrence Hill Books, 1993) at 231–33.

⁵⁹ A. Lorde & S.L. Starr, “Interview with Audre Lorde” in R. Linden et al., eds., *Against Sadomasochism: A Radical Feminist Analysis* (Palo Alto, Cal.: Frog in the Well, 1982) 66 at 69.

understanding of the section 15 *Charter* claim. If the harm of gay and lesbian pornography is not recognized, then discrimination would result from Customs' universal or uniform application of Customs legislation to all materials that meet the *Butler* test. That would mean that *Butler* discriminated on the basis of sexual orientation and needed to be reworked or jettisoned altogether. But if the Court could be convinced of this harm, it would be the decision to exempt gay and lesbian materials from review that becomes discriminatory. In other words, if pornography is a social practice that causes inequality on the basis of sex, and if the Customs legislation prohibits the importation of obscenity that meets this definition, what does it mean to deny gays and lesbians the benefit of legislative measures designed to prevent some of this inequality? That denial becomes the source of the discrimination and the focus shifts to the administration of the legislation and whether it might be corrected. Little Sisters lost its appeal before the Court because no amount of evidence of errors and sheer obstinance on the part of Customs could erase the evidence of this harm.

At its root, the debate in *Little Sisters* boils down to the consistent refusal of pornography's supporters to either accept or care that pornography is harmful. This was true of the bookstore's argument in *Little Sisters*, just as it is true of the arguments advanced by those who support heterosexual pornography. It is very difficult to find anyone who truly accepts that pornography is harmful to sex equality but who also insists that absolutely nothing can be done about it for reasons of freedom of "expression." Instead, pornography's supporters begin by ignoring its specific content and the question of harm and rely instead on the argument that a particular legislative regime is overbroad, defective, vague, oppressive, or unfair. But as soon as alternative regimes or responses are suggested, the floor shifts, and their argument becomes that pornography is harmless, transformative, and fun. Those of us who understand that pornography is part of the machinery of sex inequality should refuse to play a game where the rules keep changing. In particular, we must refuse to take seriously claims made about pornography where harm is *presumed*, for the sake of argument, rather than accepted. There is little point debating questions of administrative fairness with those whose support of pornography lead them to favour only ineffective responses.

Little Sisters' attack on the administrative scheme in place for the review of materials by Customs was less effective because of the bookstore's insistence that pornography, or gay and lesbian pornography, or gay and lesbian pornographic books, were not harmful at all. When the bookstore was forced to defend this position, they were unable to do so. Specifically, they were unable to convince the Court that the glorification of sexual violence is not harmful, that the imitation of the worst of heterosexual sex

by two men or two women is transformative, or that sexism, homophobia, and racism are much fun at all.

